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No. 90-41
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In The
Supreme Court of the United States
October Term, 1990

STATE OF WISCONSIN,

Petitioner,
v.

LIONEL D. WALKER,

Respondent.

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT**

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**PETITIONER'S REPLY TO RESPONDENT'S
SUPPLEMENTAL STATEMENT OF THE CASE**

Respondent Lionel Walker correctly notes that his postconviction proceeding in the Wisconsin courts arose under Wis. Stat. § 809.30(2)(h), not under Wis. Stat. § 974.06. Respondent's Brief at 1-2. Petitioner regrets and apologizes for the erroneous ascription. With respect to the questions presented in the petition, however, a state postconviction proceeding under one statute rather than the other makes no difference: under either statute, Walker had the right to raise the same substantive and procedural claims about his trial counsel's performance, the State of Wisconsin had the right to raise the same

defenses to those claims, and the Wisconsin courts had the same authority to resolve the issues raised. In short, the statutory numbers differ, but the result remains the same, procedurally and substantively.

Walker discounts the 17-month delay in raising his *Batson* objection.¹ Respondent's Brief at 2. Walker does not dispute that his trial counsel failed to make a timely objection at trial to the prosecutor's peremptory strike. Thus, whether Walker failed to object for seventeen months or seventeen days after trial, the question presented by the petition remains unchanged: whether a timely objection at trial is prerequisite to obtaining relief under *Batson*.

ARGUMENT

I. WALKER MISLEADS THIS COURT AND MISREPRESENTS THE STATE COURT PROCEEDINGS WHEN HE ASSERTS THAT PETITIONER FAILED TO RAISE ITS *BATSON* CHALLENGE IN THE WISCONSIN COURTS.

In urging denial of the petition, Walker asserts that the State of Wisconsin "[n]ot only . . . fail[ed] to raise its present challenge in the Wisconsin courts, but it also gave no indication that resolving the case under a *Batson* analysis was problematic in any way." Respondent's Brief at 4.

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

Walker's assertion is false.

In the Wisconsin Court of Appeals, Walker advanced a state procedural argument based on *State v. Cleveland*, 118 Wis.2d 615, 348 N.W.2d 512 (1984).² In *Cleveland*, the Wisconsin Supreme Court exercised its discretionary authority to review a waived error related to defense counsel's failure to seek suppression of evidence seized pursuant to an improperly executed no-knock warrant. Walker urged the Wisconsin Court of Appeals to follow the *Cleveland* procedure and to take discretionary review of his *Batson* claim; because Walker's trial counsel failed to make a *Batson* objection at trial, the objection had been waived and Walker was not entitled to raise the claim as a matter of right.

Walker notes that the State did not respond to this argument in its brief. Respondent's Brief at 3-4. Walker neglects to mention why, however. The reason was simple: the Wisconsin Court of Appeals lacked the authority to follow the procedure Walker urged, and Walker's argument was meritless on its face.

About nine months before the parties briefed this case in the state court of appeals, the Wisconsin Supreme Court emphatically circumscribed the court of appeals' authority for discretionary review of waived errors. *State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672 (1988). Under *Schumacher*, when a party fails to object to an error in the trial court, the Wisconsin Court of Appeals has discretionary authority to review the error on either of

² Walker has filed with the clerk of this Court the parties' state court briefs.

two grounds: a claim that the error resulted in the controversy not being fully tried, or a claim that "it is probable that justice has for any reason miscarried and the appellate court can conclude that a new trial would probably produce a different result." *Vollmer v. Luety*, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990) (Babitch, J., concurring) (concurrence joined by 5 of the 6 other justices).

Walker did not advance either ground as a reason for the Wisconsin Court of Appeals to review the waived *Batson* objection in his case. Consequently, the court of appeals clearly lacked authority to do what Walker suggested, and the State therefore ignored the *Cleveland* argument, which, on its face, lacked merit. The State did, however, respond to the claim of ineffective assistance of counsel raised under *Strickland v. Washington*, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984) – a claim the court of appeals had authority to review.

The Wisconsin Court of Appeals did not decide Walker's appeal. Instead, the court certified the case to the Wisconsin Supreme Court, which accepted certification and ordered that the briefs filed in the court of appeals serve as the briefs in the supreme court. See Petition at 9 (noting that the parties did not file additional briefs).

At oral argument in the Wisconsin Supreme Court, the State addressed the *Cleveland* procedure.³ In response to Justice Shirley Abrahamson's question whether the court could "go right to the substantive issue [of the

³ Walker has filed with the clerk of this Court the transcript of the oral argument in the Wisconsin Supreme Court.

Batson claim]," Transcript of Oral Argument at 48, State's counsel responded (as Walker notes at page 4 of his brief), "I think you can do that," Transcript at 48.

Walker flatly misstates the record, however, in asserting that this agreement about a state procedural matter also constituted acquiescence in the Wisconsin Supreme Court's subsequent interpretation and application of *Batson* in *State v. Walker*, 154 Wis.2d 158, 453 N.W.2d 127 (1990). As shown by the transcript of oral argument, the State repeatedly noted that a timely objection was prerequisite to relief under *Batson*.

The State's petition thus does not constitute, as Walker claims, a "belated challenge." Respondent's Brief at 4. The State addressed Walker's state procedural argument under *Cleveland* in the first forum – the Wisconsin Supreme Court – in which the argument had any merit under state law. There, the State agreed that, as a matter of state law, the state supreme court could, in its discretion, review the *Batson* claim on its merits. The review of the *Batson* claim itself, however, required the court to apply federal standards, including (as the State has consistently argued) a requirement of a timely objection in order to obtain relief under *Batson*.

Consequently, Walker misplaces his reliance on *Steagald v. United States*, 451 U.S. 204 (1981). The State has not reversed its position here, as the government did in *Steagald*. The State has taken a consistent position throughout: a valid *Batson* claim and ensuing relief require a timely objection to the prosecutor's peremptory strike.

II. CONTRARY TO WALKER'S BELIEF, PETITIONER HAS NOT ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REVIEW WALKER'S BATSON CLAIM. RATHER, PETITIONER HAS ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S APPLICATION OF BATSON ITSELF.

The State agrees with Walker "that procedural default in a state prosecution is a state law question." Respondent's Brief at 6. For that reason, the State has not asked this Court to assess the propriety of the Wisconsin Supreme Court's decision to exercise discretionary review under *Cleveland*, 118 Wis.2d 615. Rather, the State has petitioned for certiorari review of the Wisconsin Supreme Court's interpretation and application of *Batson* once that court decided to conduct a discretionary review.

Walker obviously fails to understand the point, probably because he sees a *Batson* objection as having only a state procedural character. The State, however, has argued (consistent with other court decisions cited in the petition) that a timely objection is an essential element of a *Batson* claim.

A failure to make a *Batson* objection operates in two dimensions. As a matter of state law, a court can treat the failure to object as a procedural error precluding appellate review as of right but nonetheless permitting the discretionary review of the error. That's what the Wisconsin Supreme Court did.

On the merits of a *Batson* claim, however, a court must treat the failure to object as a matter of the federal substance of *Batson*, which requires a timely objection;

without a timely objection, a defendant does not have a *Batson* claim. In effect, the merits of a *Batson* claim raised in the wake of a failure to object are that the claim has no merit because of the failure to object. That's where the Wisconsin Supreme Court erred – it failed to acknowledge the substantive component of the objection – and that's the aspect of *Walker* the State urges this Court to review.

The State does not dispute *Walker*'s assertion that the facts were as fully developed as a 17-month delay allows. Respondent's Brief at 8. But that assertion underscores the error in the Wisconsin Supreme Court's application of *Batson*. Until the Wisconsin Supreme Court decided *Walker*, only a timely *Batson* objection stood between a prosecutor and his or her unfettered exercise of peremptory strikes. In the absence of a timely *Batson* objection, a prosecutor had no obligation to justify his or her peremptory strike of any juror. A prosecutor could peremptorily strike any juror, black or white, for any reason and without asking that juror any questions to discern a "disqualifying attitude." Now, according to the Wisconsin Supreme Court, an objection at any time suffices to force a prosecutor to justify a peremptory strike.

Petitioner believes, along with courts in jurisdictions other than Wisconsin, that this Court did not intend a "timely objection" under *Batson* to include an objection made after trial ends. That's the federal error committed by the Wisconsin Supreme Court when it elected to review *Walker*'s *Batson* claim, and that's the federal-law question the State of Wisconsin urges this Court to review.

CONCLUSION

This Court should grant the petition for a writ of certiorari and review the Wisconsin Supreme Court's application of this Court's decision in *Batson*.

Dated this 22nd day of October, 1990.

Respectfully submitted,

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